No. 89-972

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

ANDREW HUNSBERGER,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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146 pp

QUESTIONS PRESENTED

Is an accused deprived of his Fifth, Sixth and Fourteenth Amendment rights to remain silent, to counsel, and to due process of law when his questions concerning the meaning of his right to counsel, asked after the administration of *Miranda* warnings and subsequent warnings of the right to counsel, are introduced against him at trial as evidence of his sanity, contrary to decisions of both this Court and courts of last resort of other states?

LIST OF PARTIES

The caption contains the names of all of the parties in the lower courts.

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No. 89-

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COMMONWEALTH OF PENNSYLVANIA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

The petitioner, Andrew Hunsberger, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Pennsylvania, entered in the above titled proceedings on October 20, 1989.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania has yet to be reported, but is reprinted in the appendix hereto, p. 1a, *infra*. The decision of the Superior Court of Pennsylvania is reported at 358 Pa. Super. 207, 516 A.2d 1257, and is reprinted in the appendix hereto, p. 10a, *infra*. The

decision of the Bucks County Court of Common Pleas, in the form of an opinion rendered from the bench, has not been reported, and is reprinted in the appendix hereto, p. 23a, *infra*.

STATEMENT OF SUPREME COURT JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on October 20, 1989, reversing the judgment of the Superior Court of Pennsylvania, which had affirmed the order of the Bucks County, Pennsylvania Court of Common Pleas, suppressing certain statements uttered by the petitioner following his arrest. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution states in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor shall be deprived of life, liberty, or property without due process of law . . .

The Sixth Amendment to the United States Constitution states in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

The Fourteenth Amendment to the United States Constitution states in pertinent part:

> [N]or shall any state deprive any person of life, liberty or property, without due process of law . . .

STATEMENT OF THE CASE

The facts of this case were stipulated to by the petitioner and the respondent at the pre-trial suppression hearing. At approximately 12:25 p.m. on October 14, 1985 the petitioner was arrested at his parents' home in Milford Township, Bucks County, accused of having killed his mother. He was thereafter taken to a local state police barracks where he was advised of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), by a state trooper. Petitioner stated that he understood his rights, and wished to speak to an attorney, whereupon interrogation ceased. The respondent has conceded the inadmissibility of these responses to the *Miranda* warnings.

The respondent sought to introduce three subsequent queries by the petitioner concerning his right to counsel. The first was made at approximately 2:20 p.m. or thereafter, when a deputy district attorney entered the room in which the petitioner was being held at the state police barracks. The petitioner asked her whether she, the deputy district attorney, was his lawyer. When informed that she was an assistant district attorney, and not the lawyer he had requested, petitioner replied that he did not wish to speak to her.

The second statement at issue was made at approximately 4:40 p.m. on the same day. At the petitioner's preliminary arraignment, District Justice Kathryn Stump once again informed the petitioner that he could apply for the services of a public defender, whose office was located on the sixth floor of the courthouse. Petitioner responded, "How can I get to see the public defender on the sixth floor of the courthouse if I am in jail?"

The third statement at issue was made at approximately the same time. First Assistant District Attorney Alan Rubenstein was with the petitioner both while he was in the police station and was receiving his preliminary

arraignment. Both Mr. Rubenstein and District Justice Kathryn Stump advised the petitioner that he would be eligible to receive a public defender. The petitioner then asked Mr. Rubenstein, "Are public defenders as good as money lawyers?"

The petitioner, who gave pre-trial notice of his intention to proceed with an insanity defense, moved in a timely, written fashion to suppress these statements before trial, asserting that their introduction into evidence would unfairly penalize his exercise of his right to counsel and to remain silent under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and the corresponding guarantees contained in the Pennsylvania Constitution. The Honorable Edward G. Biester, Jr., judge of the Bucks County Court of Common Pleas, granted the suppression motion. *Infra*, pp. 24a-27a. Judge Biester found that the challenged statements constituted requests for counsel, and as such, inadmissible pursuant to this Court's ruling in *Wainwright v. Greenfield*, 474 U.S. 284 (1986).

The respondent immediately undertook an interlocutory appeal to the Superior Court of Pennsylvania, alleging that the Common Pleas Court's order substantially handicapped the prosecution. A three judge panel of the Superior Court, with one judge dissenting, affirmed the ruling of the Common Pleas Court. The majority's opinion noted that the respondent had stipulated that the challenged statements were attempts by the petitioner to invoke his right to counsel. *Infra* at 15a.

The respondent thereafter successfully petitioned the Supreme Court of Pennsylvania for review of the Superior Court's decision. On October 20, 1989, a unanimous Supreme Court reversed the Superior Court's decision with regard to the statements to District Justice Kathryn Stump and Mr. Rubenstein. Five members of the court held that the query to the assistant district attorney was inadmissible. Chief Justice Robert N.C. Nix, Jr., concurring and dissenting, held that the third statement was also admissible.

The Pennsylvania Supreme Court found that the petitioner's statements were not indicative of a desire to remain silent, and therefore admissible to demonstrate the petitioner's sanity. In the Pennsylvania Supreme Court's words:

> The statements at issue are not comments by the prosecutor regarding the Appellee's [petitioner's] invocation of his right to remain silent; they are statements of the Appellee's intent to elicit information regarding either his attorney or the obtaining of an attorney. The statements in question, excepting for the third statement [regarding whether the assistant district attorney was his attorney] cannot remotely be indicative of the Appellee's right to remain silent. They are neither utterances which in and of themselves can be deemed inculpatory, nor were they elicited by questions solicited by authorities following Appellee's expression of his intent to invoke Fifth Amendment rights.
>
> It is only statements which *directly* bear upon that right, whether voluntary or elicited through questioning, which are safeguarded by the Fifth Amendment and *Wainwright*.

Infra at 7a (emphasis in original). The Pennsylvania Supreme Court noted in passing that the petitioner's statements would only be relevant in cases where the prosecution sought to establish a defendant's sanity. In all other cases, the Court acknowledged, these statements would be inadmissible. *Infra* at 6a n.2.

REASONS FOR GRANTING THE WRIT

The Pennsylvania Supreme Court's holding that a defendant's questions concerning access to and the quality of appointed counsel, asked immediately after the administration of *Miranda* warnings, are admissible at trial as proof of sanity, unfairly penalizes defendants who wish to exercise those rights but cannot do so because they do not fully understand them, and is in conflict with decisions of this Court and courts of last resort of other states.

In this case, the Pennsylvania Supreme Court has ruled that solely because the petitioner's state of mind is at issue, questions he asked following the administration of *Miranda* warnings concerning the meaning of his right to counsel are admissible against him at trial. This holding is contrary to settled doctrine establishing that such inquiries are manifestations of the "silence" which may not be used to establish a defendant's guilt, and ignores the circumstances in which the petitioner's inquiries arose. Both inquiries deemed admissible by the court, according to facts stipulated to by the respondent, occurred immediately after and in response to the recitation by the district court and district attorney of information concerning his right to counsel. The petitioner's inquiries were necessitated by the warnings he received, and as such, an invocation of the right to counsel of which he had just been informed. Thus, the decision of the Pennsylvania Supreme Court constitutes an unwarranted curtailment of prior rulings of this Court, and a divergence of authority with several courts of last resort of other states, all of which guarantee that the invocation of *Miranda* rights will not be used to prove a defendant's guilt.

The Pennsylvania court's holding unfairly penalizes the defendant who does not fully understand his rights and so must seek some explanation of them. The Pennsylvania Supreme Court wrongly refused to acknowledge that the

petitioner's questions directly addressed and sought clarification of his assertion of the rights to counsel and to remain silent. Additionally, the Pennsylvania Supreme Court errs in emphasizing the timing of the petitioner's questions by refusing to apply this Court's holding in *Wainwright v. Greenfield*, 474 U.S. 284 (1986), to any statements made or questions raised *after* the bare assertion of the rights. In each regard, the Pennsylvania court thus ignored the purposes behind the exclusion of evidence that a defendant has invoked his rights to remain silent and to consult with counsel: the protection of the exercise of those rights and the inherent promise to the accused that their exercise will not be used against him at trial. The court's decision impermissibly allows the respondent to "exploit the recital of *Miranda* warnings to sing the Siren's song and lure a defendant into creating evidence against himself." *People v. Stack*, 112 Ill.2d 301, 307, 493 N.E.2d 339, 341, 97 Ill. Dec. 676, *cert. denied*, 479 U.S. 870 (1986).

In *Wainwright v. Greenfield*, this Court prohibited the prosecution from using as evidence of sanity an accused's post-*Miranda* warnings statement of a desire to remain silent until an attorney has been consulted. 474 U.S. at 295 n.13. In *Greenfield*, *Miranda* warnings were repeatedly administered to the accused, who each time asserted his right to remain silent and his desire to speak with counsel before making a statement. This evidence was introduced at trial and, in the prosecutor's closing argument, cited as evidence of the accused's soundness of mind. 474 U.S. at 286-87. This Court held that admission of this evidence and its use in closing argument violated due process, adhering to the reasoning of *Doyle v. Ohio*, 459 U.S. 610 (1976), that warnings administered pursuant to *Miranda* carry an implicit assurance that an accused's exercise of the rights he has just learned will not be penalized. *Wainwright v. Greenfield*, 474 U.S. at 292. That assurance having been given, it is fundamentally unfair for the prosecution to use the accused's assertion of the right to remain silent against

him, whether it be to show guilt or to show the accused's sanity. *Id.*

Ignored by the Pennsylvania court is what *Wainwright v. Greenfield* and *Doyle v. Ohio* mean by "silence." *Wainwright v. Greenfield* unambiguously answers the question:

> With respect to post-*Miranda* warnings "silence," we point out that silence does not mean only muteness; it includes the statement of a desire to remain silent, as well as of a desire to remain silent until an attorney has been consulted.

474 U.S. at 295, n.13. The due process clause of the Fourteenth Amendment protects more than actual, literal silence. First, it protects statements intended to invoke *Miranda* rights, which clearly extends to efforts to clarify or understand those rights. Second, it protects not only the assertion of the right to remain silent, but also the assertion of the right to consult with an attorney — the right that flows from and protects the Fifth Amendment right to remain silent, *Michigan v. Jackson*, 475 U.S. 625, 631 (1986), and the Sixth Amendment right to counsel following the arraignment. *Brewer v. Williams*, 430 U.S. 387, 397-99 (1977). As a result, *Wainwright v. Greenfield* instructs, "What is impermissible is the evidentiary use of an individual's *exercise of his constitutional rights* after the State's assurance that the invocation of those rights will not be penalized." 474 U.S. at 295 (emphasis added).

The statements which the Pennsylvania Supreme Court deems admissible against petitioner — questions about the difference between public defenders and private counsel and how petitioner would be able to talk to the promised lawyer — plainly represent petitioner's efforts to understand and effectuate his promised rights. Petitioner's questions not only reflect his initial words exercising the right to consult with an attorney, but also are inextricably woven with his exercise of that right. Moreover, considering the fact that these last two questions were asked after First

Assistant District Attorney Rubenstein and District Justice Stump readvised petitioner of his right to an appointed attorney, they stand as part of the reassertion of that right. Indeed, the statements fall directly within the letter and spirit of this Court's ruling in *Wainwright v. Greenfield:* when *Miranda* warnings have been administered, carrying with them an implicit assurance that an assertion of the promised rights will not be penalized, fundamental fairness precludes breach of that assurance by using the assertion of that right against him at trial to overcome his plea of insanity. 474 U.S. at 292.

The Pennsylvania Supreme Court, however, too narrowly construed the utterances at issue as having nothing to do with the assertion of the promised rights, and by doing so concomitantly has unduly circumscribed the rule announced in *Wainwright v. Greenfield* to find its prohibition applicable only to actual muteness or to actual requests for counsel. As a result, the Pennsylvania court's decision transforms petitioner's efforts to understand his rights into arrows in the prosecution's quiver, to be targeted at an accused who did not understand the full promise of the *Miranda* warnings. The implied promise that the exercise of the *Miranda* rights will not be used to prove guilt does not, by the Pennsylvania Supreme Court's reasoning, extend to questions directly related to the exercise of those rights — questions to which some defendants, particularly those who may be mentally disturbed or handicapped, may need answers in order to intelligently exercise the promised rights.

This result is neither fair nor permitted by *Wainwright v. Greenfield* or other holdings of this Court. Defendants must possess a full and knowing understanding of their rights if they are to exercise them or, conversely, to waive them. Thus, time after time, this Court has iterated the need of the prosecution to prove that a criminal defendant demonstrated a knowing and intelligent understanding of

the promises contained in the *Miranda* warnings as proof that he voluntarily waived those rights. *See, e.g., Edwards v. Arizona,* 451 U.S. 477, 482 (1981); *Fare v. Michael C.* 442 U. S. 707, 724-25 (1979); *see also Johnson v. Zerbst,* 304 U.S. 458, 464 (1938).

The Pennsylvania court's analysis in this case is antagonistic to these principles. Under that court's decision, the accused who does not understand his rights is penalized by having his efforts to understand his promised rights used against him at trial. Although the Pennsylvania Supreme Court's holding allows that a defendant's exercise of his *Miranda* rights is inadmissible to prove his sanity, any questions posed in an effort to understand those rights are admissible. This is fundamentally unfair. The Pennsylvania Supreme Court's decision unjustifiably creates a gap between the protection afforded one who must ask questions in order to understand the rights he has been promised and one who understands them without the need for further explanation. No decision of this Court allows this demarcation between the protection granted for attempting to understand one's rights and that granted for actually exercising them. Unprecedented, the opinion of the Pennsylvania Supreme Court is wrong and must be reversed.

As the Pennsylvania Supreme Court recognized that the words the petitioner uttered when the *Miranda* rights were read and when he spoke to the deputy district attorney were inadmissible, one is hard-pressed to understand how the prosecutor's use of subsequent statements questioning and reinvoking the very same rights would not constitute a reference to petitioner's decision to remain silent about the charges against him. The only clear principle that one can divine from the court's reasoning is that the *timing* of an accused's words, rather than their meaning, is the critical constitutional concern: that is, to enjoy the protection of due process, the accused may assert or question his rights only at the time the *Miranda* warnings are

given or when he mistakenly believes he is speaking to his attorney. Under the plain language and reasoning of *Wainwright v. Greenfield* however, the statement's substance, not its timing, is the deciding factor: this Court in *Wainwright v. Greenfield* placed absolutely no time limit on the utterance of the words. 474 U.S. at 295 n.13. Moreover, the court misses the heart of *Wainwright v. Greenfield* and this case when it finds that the statements "cannot remotely be indicative of the [petitioner's] intent to remain silent . . . nor were they elicited by questions solicited by authorities following [petitioner's] expression of his intent to invoke his Fifth Amendment rights." *Infra* at 7a. These inquiries, the court finds, are ordinarily inadmissible. *Infra* at 6a n.2.[1] The court therefore holds that because these statements are voluntary and unsolicited, their introduction, would not offend petitioner's Fifth Amendment rights, and therefore are admissible at trial to prove his state of mind.

In stark contrast, the statements here were concerned exclusively with appellee's constitutional rights themselves and in each instance were "triggered" by either a confrontation with and/or rewarning by a prosecuting attorney or District Justice Stump. Under the *Wainwright v. Greenfield* analysis, the circumstances and environment under which petitioner's words were uttered — such as whether they were freely given or "compelled" because of the accused's mental condition, or whether they were spontaneous or the product of improper custodial interrogation — obviously are not the appropriate considerations.

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1. The Pennsylvania Supreme Court stated in this regard:

> We note in passing that the statements sought to be introduced here would only be relevant in a case where the prosecutor is attempting to establish the sanity of a defendant. In all other instances, such evidence would normally be excluded. . . .

Infra at 6a n.2. *Wainwright v. Greenfield* unequivocably rejects this distinction. 474 U.S. at 292.

Cases decided by the courts of last resort of other states confirm that any evidence reflecting upon the accused's invocation of his *Miranda* rights falls within the proscription of the due process clause. For example, in *People v. Stack, supra,* an accused was advised of his *Miranda* rights, upon which he asked what would happen if he chose to remain silent. The prosecution placed this inquiry before the jury, and in summation, argued that it demonstrated that contrary to the accused's claim, he was of sound mind at the time of the crime. 112 Ill.2d at 305, 493 N.E.2d at 340. The Illinois Supreme Court held that all of this discussion fell squarely within *Wainwright v. Greenfield*'s holding and should not have been admitted in the prosecution's attempt to rebut the accused's insanity defense. 112 Ill.2d at 307, 493 N.E.2d at 341.

Similarly, in *State v. Rogers,* 32 Ohio St.3d 70, 512 N.E.2d 581 (1987) evidence was introduced that the defendant, when read the *Miranda* warnings, stated that he understood his rights and wished to speak with a lawyer. Subsequently, the defendant went to a telephone, looked up the number of an attorney, called the number, and had a conversation with the lawyer. He then told the police that he had consulted his lawyer and had been advised to say nothing. The prosecutor used this evidence to rebut the defendant's claim of insanity. The Ohio Supreme Court reversed the defendant's conviction, holding that this evidence of the defendant's exercise of his rights after receiving the *Miranda* warnings violated due process as explained by the United States Supreme Court in *Wainwright v. Greenfield.* 32 Ohio St.3d at 73, 512 N.E.2d at 584. *See also Wilson v. State,* 514 N.E.2d 282, 283 (Ind. 1987) (defendant's statements requesting counsel inadmissible as evidence of sanity because they were the equivalent of muteness); *Commonwealth v. Mahdi,* 388 Mass. 679, 695, 448 N.E.2d 704, 713 (1983) ("we fail to see how use of evidence to infer sanity substantively differs from use to infer guilt or use for impeachment purposes"); *State v. Burwick,* 442 So.2d 944, 948 (Fla. 1983), *cert. denied,* 466 U.S. 931

(1984) (quoted in *Wainwright v. Greenfield*)[2]; *State v. Hull*, 210 Conn. 481, 556 A.2d 154, 160 (1989) ("The state cannot justify testimony about the defendant's invocation of his right to counsel as rebutting his claim of intoxication and extreme emotional disturbance.").

The Pennsylvania Supreme Court's decision thus creates a divergence of authority in the wake of *Wainwright v. Greenfield*'s holding that evidence of an accused's silence may not be introduced as evidence of his sanity. The opinion below holds that once a defendant has requested counsel, his questions concerning the implementation and meaning of that right are admissible to prove his sanity even if those questions are in response to and directly follow new warnings of his right to counsel. The Pennsylvania Supreme Court's decision, if allowed to stand, would render admissible any questions asked by defendants who do not understand repeated admonitions concerning their constitutional right to counsel. The anomalous result will be the exclusion of their invocation of their rights, while using against them their post-warning questions concerning the meaning of their rights.[3] Moreover, this evidence would be admissible only against defendants who raise the insanity defense, for as the Pennsylvania Supreme Court acknowledges, the introduction of this evidence in any other context would violate an accused's constitutional rights.

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2. The Pennsylvania Supreme Court's decision erroneously states that *Wainwright v. Greenfield* overturned a balancing test established for the admissibility of an accused's silence as evidence of guilt established in Florida in *Greenfield v. State*, 337 So.2d 1021 (Fla. 2d Dist. Ct.App. 1976), the state court decision eventually overturned by this Court's decision. *Infra* at 4a-5a. To the contrary, at the time this Court decided *Wainwright v. Greenfield*, the Florida Supreme Court, in *State v. Burwick*, *supra*, had long rejected *Greenfield v. State*'s holding rendering evidence of an accused's post-*Miranda* silence inadmissible to prove his sanity. *Wainwright v. Greenfield* in turn affirmed a decision of the United States Court of Appeals for the Eleventh Circuit to grant the defendant, who had petitioned for a writ of habeas corpus, a new trial.

3. Indeed, this Court has recognized that defendants, in response to receiving *Miranda* warnings, commonly ask *when* they will receive an attorney. *Duckworth v. Eagan*, ____ U.S. ____, 109 S.Ct. 2875, 2880, 106 L.Ed.2d 166, 178 (1989).

The Pennsylvania Supreme Court's decision erects a distinction between an accused's questions about his *Miranda* rights and the invocation of those rights, and the admissibility of invocations of the right to counsel in cases involving insanity and those which do not, which has been repeatedly rejected by other state courts of last resort, and this Court. Both of the petitioner's statements were uttered in response to warnings given by the respondent and the district court to inform him of his constitutional right to counsel. *Wainwright v. Greenfield* holds that these warnings give implicit promises that the exercise of the rights will not be penalized. 474 U.S. at 292. Yet the respondent in this case proposes to turn petitioner's attempt to learn how to invoke his rights into evidence of his sanity, and therefore his guilt. The petitioner's pending trial should not be tainted by such error. Plenary consideration of this case by this Court is therefore essential.

CONCLUSION

The petitioner respectfully requests this Honorable Court to issue a Writ of Certiorari to the Supreme Court of Pennsylvania to review the question presented herein, based upon a conflict between the Supreme Court of Pennsylvania and both this Honorable Court and the courts of last resort of other states.

Respectfully submitted,

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APPENDIX

Supreme Court of Pennsylvania
Eastern District

COMMONWEALTH OF PENNSYLVANIA	:	NO. 113 E.D. APPEAL DOCKET 1987
	:	
v.	:	
	:	
ANDREW HUNSBERGER	:	

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the Superior Court is reversed and the matter is remanded to the Court of Common Pleas of Bucks County for disposition consistent with this Opinion.

Marlene F. Lachman, Esq.
Prothonotary

Dated: 10/20/89

In the Supreme Court of Pennsylvania
Eastern District

COMMONWEALTH OF PENNSYLVANIA	:	No. 113 E.D. Appeal Dkt. 1987
Appellant	:	Appeal from the Order of the Superior Court, No. 955, Philadelphia 1986, dated November 3, 1986, affirming the Suppression Order of the Court of Common Pleas, Criminal Division, Bucks County, No. 4683 of 1985.
v.	:	
ANDREW HUNSBERGER, Appellee	:	358 Pa. Super. 207, 516 A.2d 1257 (1986)
	:	ARGUED: January 21, 1988

OPINION

JUSTICE ZAPPALA FILED: OCTOBER 20, 1989

This appeal compels us to resolve a very limited issue as to whether or not a defendant's extemporaneous statements made after being given and invoking his *Miranda*[1] rights, may be introduced by the Commonwealth as evidence to rebut an insanity defense.

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1. *Miranda v. Arizona*, 384 U.S. 436 (1966)

The chronicle of this case, as disclosed by stipulated facts presented at the suppression hearing prior to trial, disclose that State Police arrested Appellee on October 14, 1985 at the home of his parents. He was charged with the shooting of his mother. He was subsequently taken to State Police barracks in Dublin and formally advised of his *Miranda* rights. In response, Appellee stated that he wished to speak with an attorney. All questioning of Appellee thereafter ceased.

After invoking his rights, Appellee made various spontaneous, voluntary comments, the majority of which were not challenged as inadmissible by Appellee's counsel. Three of those statements, however, comprise the basis for the suppression request, on the predicate that their introduction would constitute an impermissible comment on Appellee's invocation of his right to remain silent. The statements in question are:

1. Appellee's question to First District Attorney Alan Rubenstein after being advised that he would be able to receive a public defender, "Are public defenders as good as money lawyers?";

2. Appellee's question to District Justice Kathryn Stump at the time of his preliminary arraignment in which he asked, "How can I get to see the public defender on the sixth floor of the courthouse if I am in jail?"; and

3. Appellee's question to Deputy District Attorney Rea Mabon when she approached him in the Dublin Barracks of the Pennsylvania State Police as to whether she was his lawyer, and when she replied in the negative, his statement that he did not want to speak to her.

It was the intention of the Commonwealth to use these statements as probative of Appellee's state of mind immediately following the crime and therefore be relevant to its burden of rebutting Appellee's insanity defense.

Appellee's counsel filed a motion to suppress these statements and, following a hearing on April 7, 1986, the motion was sustained. The Commonwealth, pursuant to

our holding in *Commonwealth v. Dugger*, 506 Pa. 537, 486 A.2d 382 (1985), filed a timely interlocutory appeal to the Superior Court. The Court affirmed the determination below. The Commonwealth then filed a petition for Allocatur to this Court. We granted the petition to resolve what we perceive to be a question heretofore never addressed in this jurisdiction. Following a thorough analysis of this matter, and for the reasons which follow, we now reverse in part the determination of the Superior Court and lower court.

The theory underlying the Superior Court's affirmance of, and the trial court's decision to suppress Appellee's voluntary statements, is that the case sub judice is indistinguishable from the decisions rendered by the U.S. Supreme Court in *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 224, 49 L.Ed. 2d 91 (1976) and *Wainwright v. Greenfield*, 474 U.S. 284, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986).

Do[y]le establishes the precept that the silence of a defendant, following *Miranda* warnings, is "insolubly ambiguous", and cannot be used at trial for impeachment purposes. *Wainwright*, adopting the holding in *Do[y]le*, further refines that decision by concluding that the prosecution may not use post-arrest, post-Miranda silence as affirmative proof of sanity when attempting to rebut an insanity defense.

The underlying hypothesis of both *Do[y]le* and *Wainwright* is the tacit assurance contained in *Miranda* warnings that silence will carry no penalty and the "fundamental unfairness" of subsequently allowing the use of that silence to later impeach an explanation subsequently offered at trial. *Wainwright*, 106 S.Ct. at 291.

In *Wainwright*, the Florida Court of Appeals for the Second District, *sub nom Greenfield v. State*, 337 So. 2d 1021 (1976), affirmed the conviction of Greenfield, who had alleged trial error when the prosecutor commented in his

closing argument to the jury about Greenfield's coherent responses after being given *Miranda* warnings. Greenfield's defense had been his insanity at the time the crime was committed. The Florida Court of Appeals held that prosecutorial comment relating to a defendant's insistence on his right to remain silent, while generally constituting reversible error, did not apply to a case in which an insanity plea had been filed. *Id.*, at 1022. The justification for this conclusion was predicated upon the great weight the Florida court acorded to the prosecutor's heavy burden of proving a defendant's sanity where he has interposed an insanity defense.

Irrespective of the rationale of the Florida Court in *Greenfield*, the U.S. Supreme Court reversed this balancing and, in so doing, rendered the prohibition of the use of a defendant's silence at trial as absolute.

We wholeheartedly embrace the same, as did the Superior Court, this theory of absolute prohibition. Where we differ, however, from the Superior Court is in its application of that principle to the circumstances before us.

It is clear that the common thread which runs throughout *Wainwright* is emphasizing the *silence* of the defendant or of his exercise of that right. In the case before us, however, we are not faced with Appellee's silence, but with his comments made following the invocation of his right to remain silent. As such, we view the facts before us as presenting an entirely different scenario from *Wainwright*, yet we find guidance there, for contained in the opinion is a discussion which contemplated the situation we are confronted with here and pilots us across the fine line we must ambulate to resolve this issue fairly; for the key to maintaining the rights bestowed upon citizens by the Constitution is applying them in a manner which does not allow them to be a shield for conduct not contemplated or which is merely tangentially related.

As indicated the Florida Court of Appeals balanced the burden between the prosecutor to prove a defendant sane, as against the prohibition against commenting on a defendant's choice to remain silent. The balance was struck in favor of the prosecutor and that determination was reversed by the U.S. Supreme Court. *Wainright,* supra. In a dissent, however, to that Florida decision, it was suggested that the application of the general rule would not have prejudiced the prosecution because the "questions and answers could have been couched in such a manner as to permit the officer to convey to that jury the fact that the appellant carried on a perfectly rational conversation without specifically stating that he chose to avail himself of his right to remain silent." *Greenfield,* 337 So. 2d at 1023. Similarly, the *Wainwright* court recognized this premise and further amplified it stating that:

> the State's legitimate interest in proving that the defendant's behavior appeared to be rational at the time of his arrest could have been served by carefully framed questions that avoided any mention of the defendant's exercise of his constitutional rights to remain silent and to consult counsel. What is impermissible is the evidentiary use of an individual's exercise of his constitutional rights after the State's assurance that the invocation of those rights will not be penalized.

Wainwright, 474 U.S. at 295.

We believe that these interpretations strike a proper balance where the greater need for the Commonwealth to establish the sanity of a defendant is interposed with the defendant's invocation of his right to remain silent[2]. The statements at issue are not comments by the prosecutor

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2. — We note in passing that the statements sought to be introduced would only be relevant in a case where the prosecutor is attempting to establish the sanity of a defendant. In all other instances, such evidence would normally be excluded for that reason notwithstanding the violation of Constitutional Rights claims.

regarding the Appellee's invocation of his right to remain silent; they are statements of the Appellee's intent to elicit information regarding either his attorney or the obtaining of an attorney. The statements in question, excepting for the third statement, cannot remotely be indicative of the Appellee's intent to remain silent. They are neither utterances which in and of themselves can be deemed inculpatory, nor were they elicited by questions solicited by authorities following Appellee's expression of his intent to invoke his Fifth Amendment rights.

It is only statements which *directly* bear upon that right, whether voluntary or elicited through questioning, which are safeguarded by the Fifth Amendment and *Wainwright.*

As we previously indicated, it is Appellee's third statement which causes us concern. That statement occurred when the Appellee asked the District Attorney whether she was his lawyer, to which she answered in the negative. The Appellee then stated that he did not want to talk to her any further. This utterance does tend to imply that the Appellee would speak only to his attorney. We, therefore, affirm the suppression of that single statement.

For the reasons set forth above, the Order of the Superior Court is reversed and the matter is remanded to the Court of Common Pleas of Bucks County for disposition consistent with this opinion.

Reversed and remanded.

Mr. Chief Justice Nix files a Concurring and Dissenting Opinion.

In the Supreme Court of Pennsylvania
Eastern District

COMMONWEALTH OF PENNSYLVANIA,	:	No. 113 E.D. Appeal Dkt. 1987
Appellant	:	Appeal from the Order of the Superior Court, No. 955 Philadelphia 1986, dated November 3, 1986, affirming the Suppression Order of the Court of Common Pleas, Criminal Division, Bucks County, No. 4683 of 1985.
v.	:	
ANDREW HUNSBERGER,	:	358 Pa. Super. 207,
Appellee	:	516 A.2d 1257 (1986)
	:	ARGUED: January 21, 1988

CONCURRING AND DISSENTING OPINION

NIX, C. J. FILED: OCTOBER 20, 1989

The concerns addressed by the U.S. Supreme Court in *Doyle v. Ohio,* 426 U.S. 610 (1976) and *Wainwright v. Greenfield,* 474 U.S. 284 (1986) are obviously not implicated in the factual setting of the instant appeal. In *Doyle,* the concern was occasioned by the attempted use of silence following the administration of *Miranda* warnings for impeachment purposes. In *Wainwright,* the silence was sought to be used as affirmative proof of sanity. Here, volun-

tary statements after the warnings are the subject of the inquiry. The Commonwealth sought to use these statements to rebut the defendant's claim of insanity. There is no basis for claiming that the legitimate constitutional concerns raised in the *Doyle* and *Wainwright* cases in any way suggest such a concern is present in this instance.

I, therefore, cannot agree with the opinion of the Court in its affirmance of the suppression of the third statement under inquiry. Appellee asked an attorney if she was his lawyer. When she said no, he stated he did not wish to converse with her further. Clearly this demonstrated a judgmental determination. The Court in *Wainwright* stated, "[w]hat is impermissible is the evidentiary use of an individual's exercise of his constitutional rights after the State's assurance that the invocation of those rights will not be penalized." 474 U.S. at 295.

In this instance, what the Commonwealth sought to introduce was neither an invocation of the constitutional right to remain silent nor a statement made in conjunction with that right. Under the facts, appellee had already been advised of his rights by the arresting officers and had indicated a desire to remain silent. The conversation which included the third statement was initiated by appellee and not connected with any type of interrogation. Consequently, the use of the statement triggers no constitutional issue. However, appellee's decision to not further converse is relevant to a determination as to his competency.

Thusly, I am constrained to dissent from the part of the mandate that affirms the suppression of that statement.

APPENDIX B

SUPERIOR COURT OF PENNSYLVANIA

No. 955 Philadelphia, 1986

COMMONWEALTH OF PENNSYLVANIA,
Appellant

vs.

ANDREW HUNSBERGER,
Appellee

On Appeal from the April 7, 1986 order of the
Honorable Edward G. Biester of the Bucks County,
Pennsylvania Court of Common Pleas
(Information No. 4683/1985)

Argued June 17, 1986.
Filed Nov. 3, 1986.

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358 Pa.Super. 207
516 A.2d 1257

Before CIRILLO, President Judge, and CAVANAUGH and TAMILIA, JJ.

TAMILIA, Judge.

A complaint was filed against appellee charging him with first degree murder in the death of his mother, Carol Hunsberger. Subsequently, trial counsel for appellee filed notice of appellee's plans to assert the insanity and mental infirmity defense. After a pre-trial suppression hearing, the lower court granted appellee's omnibus pre-trial motion to suppress certain statements voluntarily uttered by the appellee after *Miranda*[1] warnings and his request for counsel were made, but before appellee's first meeting with counsel. The matter before this Court is the appellant's interlocutory appeal from the suppression Order.

Appellee claims that the Commonwealth has failed to assert jurisdictional grounds for this appeal and that the Commonwealth must demonstrate that the evidence suppressed by the trial court substantially handicaps the Commonwealth's prosecution of this case. We disagree. As this Court stated in *Commonwealth v. Benjamin*, 346 Pa.Super. 116, 499 A.2d 337, 339 (1985):

> In *Commonwealth v. Dugger*, 506 Pa. 537, 486 A.2d 382 (1985), our Supreme Court held that the Commonwealth's appeal from a suppression order was proper as long as the Commonwealth certified in good faith that the order either 'terminates' or 'substantially handicaps' the prosecution. The good faith certification is a precaution to meritless appeals designed solely for delay. It is no longer necessary for this Court to make an independent determination from the record whether the suppression order 'terminates' or 'substantially handicaps' the prosecution.

Since the certification requirement has been satisfied, we find that the Commonwealth has an absolute right of

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1. *Miranda v. Arizona*, 384 U.S. 436, 467-73, 86 S.Ct. 1602, 1624-27, 16 L.Ed.2d 694 (1966).

appeal to this Court to test the validity of the pre-trial suppression Order.

Our standard of review in an appeal from a suppression Order is limited to determining whether the factual findings of the suppression court are supported by the record and whether the legal conclusions drawn therefrom are in error. *Commonwealth v. Webb,* 491 Pa. 329, 421 A.2d 161, 163 (1980); *Commonwealth v. Hubble,* 318 Pa.Super. 76, 464 A.2d 1236, 1237 (1983).

The parties stipulated that the statements suppressed were made voluntarily by the appellee after he was read *Miranda* warnings, had answered that he wished to remain silent, and had answered that he wanted an attorney present during questioning. After the appellee's response to the *Miranda* warnings was made, the appellee was not subjected to further questioning. The appellant has conceded that those remarks made by appellee immediately following the administration of *Miranda* warnings concerning his desire to speak to an attorney was inadmissible. However, the appellant maintains that the court below erred in suppressing the following statements:

> 1. The appellee's question to First District Attorney Alan Rubenstein after being advised that he would be able to receive a public defender, "Are public defenders as good as money lawyers?";
>
> 2. The appellee's question to District Justice Kathryn Stump at the time of his preliminary arraignment in which he asked, "How can I get to see the public defender on the sixth floor of the courthouse if I am in jail?"; and
>
> 3. The appellee's question to Deputy District Attorney Rea Mabon when she approached him in the Dublin Barracks of the Pennsylvania State Police as to whether she was his lawyer, and when she replied in the negative, his statement that he did not want to speak to her.

The importance of the statements becomes apparent when viewed in light of the appellee's raising the insanity

defense and the subsequent burden this places on the Commonwealth to prove the appellee's sanity beyond a reasonable doubt. *Commonwealth v. Bruno,* 466 Pa. 245, 352 A.2d 40 (1976). The Commonwealth asserts that the statements are highly probative of the appellee's state of mind immediately following the crime.

Appellant claims that because the statements in question were made voluntarily by the appellee after his arrest and after *Miranda* warnings were administered, no violation of appellee's constitutional rights would occur if the statements were admitted at trial. We find we must disagree with appellant and affirm the lower court's suppression of the statements to avoid infringing appellee's fifth amendment protection against compelled self-incrimination which provides the right to counsel during custodial interrogation. *Commonwealth v. Hackney,* 353 Pa.Super. 552, 510 A.2d 800, 803 (1986).

In *Doyle v. Ohio,* 426 U.S. 610, 611, 96 S.Ct. 2240, 2241-42, 49 L.Ed.2d 91 (1976), the United States Supreme Court held that silence in the wake of *Miranda* warnings may be nothing more than the arrestee's exercise of his *Miranda* rights and that because such silence is "insolubly ambiguous", it cannot be used for impeachment purposes at trial. It is the implicit assurance the *Miranda* warnings carry, "that silence will carry no penalty", which is the source of the *Doyle* Court's holding that use of an arrestee's silence is fundamentally unfair and therefore violates the Due Process Clause of the Fourteenth Amendment. *Id.* at 618, 96 S.Ct. at 2245, 49 L.Ed.2d at 422. Recently, the Supreme Court has held that it is fundamentally unfair for the prosecution to use a defendant's post-arrest and post-*Miranda* warnings silence as evidence of his sanity. *Wainwright v. Greenfield,* — U.S. —, —, 106 S.Ct. 634, 640-41, 88 L.Ed.2d 623, 632 (1986).

In *Wainwright,* the Court ruled that the *Doyle* due process rationale applies to an insanity defense situation in which the prosecution attempts to use the post-arrest and post-*Miranda* warnings silence as affirmative proof of sanity in the case in chief. *Id.* at —, 106 S.Ct. at 638-39, 88 L.Ed.2d at 630. The *Wainwright* Court stated that the fundamental unfairness found to exist in *Doyle,* that a promise that silence will not be used against an arrestee and the subsequent breach of that promise by using silence to impeach his trial testimony, exists when a breach of that promise is used to overcome the insanity defense. *Id,* at —, 106 S.Ct. at 639-40, 88 L.Ed.2d at 631. The significance of the majority Opinion in *Wainwright* does not rest solely on the Supreme Court's application of the *Doyle* due process rationale to the prosecution's use of an arrestee's silence as proof of sanity, but also rests on the Court's comment that an arrestee's constitutional right to consult counsel cannot be used against him after assurance by the state that his exercise of that right will not be so used. *Id.* at —, 106 S.Ct. at 640-41, 88 L.Ed.2d at 632. The *Wainwright* court stated that:

> [T]he State's legitimate interest in proving that the defendant's behavior appeared to be rational at the time of his arrest could have been served by carefully framed questions that avoided any mention of the defendant's exercise of his constitutional rights to remain silent *and to consult counsel.* What is impermissible is the evidentiary use of an individual's exercise of his constitutional rights after the State's assurance that the invocation of those rights will not be penalized. *Id.* (Emphasis added)

Therefore, we find that the Court should suppress post-arrest and post-*Miranda* warnings statements made by the appellee concerning his right to counsel and questioning the meaning of his *Miranda* rights.

The cases relied upon by the appellant are distinguishable from the present case because they do not deal with

post-*Miranda* statements by an arrestee concerning his right to counsel, but instead deal with voluntary statements concerning the commission of the crime in question. For example, *Commonwealth v. Hubble*, 509 Pa. 497, 504 A.2d 168, 174 (1986), involved self-incriminating statements pertaining to the crime itself, voluntarily given by the defendant after a written waiver of his *Miranda* rights, not statements concerning the defendant's right to counsel. Appellant quoted the *Hubble* court as stating:

> To hold that every utterance of the word 'lawyer' automatically erects the *Edwards* 'cone of silence' around the accused, thus insulating him from all further police-initiated questioning and communication, would be far too rigid and would not serve the interests or needs of justice.

Id. at 511, 504 A.2d at 173. Use by appellant of the above quoted comment and its referral to *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), *reh'g denied*, 452 U.S. 973, 101 S.Ct. 3128, 69 L.Ed.2d 984 (1981), is inapposite to this case as the issue in *Hubble*, *supra*, was whether the accused had invoked his right to counsel before making inculpatory statements, not whether the statements made by the accused were an effort on his part to understand the meaning of his right to counsel. As we have stated, it was stipulated by appellant that appellee invoked his right to counsel.

For the above stated reasons, we affirm the suppression Order entered by the lower court.

Order affirmed.

CIRILLO, President Judge, files a dissenting opinion.

CIRILLO, President Judge, dissenting.

I respectfully dissent.

It is well settled that upon arrest, the police must inform an accused person of his rights. In order to protect

the suspect's privilege against self-incrimination, the police must tell him that he has a right to remain silent, that any statement he does make may be used as evidence against him and that he has a right to the presence of an attorney either retained or appointed. *Miranda v. Arizona*, 384 U.S. 436, 467-73, 86 S.Ct. 1602, 1624-27, 16 L.Ed.2d 694 (1966).

The Supreme Court has also emphasized that the police may not question the accused if he indicates that he wishes to speak to an attorney. Nor can they question him if he states that he does not want to be interrogated. *Id.* at 470-73, 86 S.Ct. at 1625-27. If the police violate these procedural safeguards, any statements they have obtained will be inadmissible at trial. *Id.* at 475, 86 S.Ct. at 1628.

However, *Miranda* applies only to statements made as a result of police interrogation. Any statement spontaneously volunteered by an accused is admissible even if he has previously asserted his *Miranda* rights. *Commonwealth v. Scarborough*, 491 Pa. 300, 313, 421 A.2d 147, 153 (1980); *Commonwealth v. Myers*, 481 Pa. 217, 392 A.2d 685 (1978).

In the instant case, both parties have stipulated that the statements in question were voluntary, spontaneous utterances and were not made in response to police interrogation. Therefore, the accused's statements should be admissible. However, the appellee contends that the recent case of *Wainwright v. Greenfield*, — U.S. —, 106 S.Ct. 634, 639, 88 L.Ed.2d 623 (1986) compels a different result. However, the facts in this case are totally dissimilar from those of *Wainwright*. Also, the rationale used by the *Wainwright* Court does not apply to the situation before us. In fact, by virtue of its holding today, this panel establishes a dangerous precedent which is sure to confuse and hamstring law enforcement officials and trial courts in the pursuit of their duties.

As noted above, under *Miranda* and its progeny, the general rule is that voluntary, spontaneous statements are

admissible at trial even if an accused has stated that he intends to remain silent. In *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), the Court held that silence cannot be used against an accused. In *Wainwright*, the Court interpreted its *Doyle* holding as preventing use of an accused's silence to show that he was not insane at the time of the crime.

In *Wainwright*, the Court, per Justice Stevens, stated: "With respect to post-Miranda warnings 'silence,' we point out that silence does not mean only muteness; it includes the statement of a desire to remain silent, as well as of a desire to remain silent until an attorney has been consulted." *Id.* — at —, 106 S.Ct. at 640-41, 88 L.Ed.2d at 632 n. 4b.

Justice Stevens provided two rationales to support the Court's holding. He stated that the use of a defendant's silence is fundamentally unfair because it violates an implied promise by the government. Justice Stevens wrote that:

> Miranda warnings contain an implied promise, rooted in the Constitution that 'silence will carry no penalty.' Our conclusion [is] that it [is] fundamentally unfair . . . to breach that promise by using the defendant's post-arrest, post-Miranda warnings silence . . . as evidence of his sanity.

Id. at —, 106 S.Ct. at 641, 88 L.Ed.2d at 632. (Citations omitted).

The Court also noted that silence is "insolubly ambiguous" and thus its probative value is outweighted by the "fundamental unfairness that flows from the State's breach of its implied assurances." *Id.* at —, —, 106 S.Ct. at 640, 88 L.Ed.2d at 631-32. The Court quoted the Florida Supreme Court's view of the probative value of silence in an insanity context.

> Post-arrest, post-Miranda silence is deemed to have dubious probative value by reason of the many and ambiguous explanations for such silence . . . For example, one could reasonably conclude that custodial interrogation might intimidate a mentally unstable person to silence. Likewise, an emotionally disturbed person could be reasonably thought to rely on the assurances given during a Miranda warning and thereafter choose to remain silent. In sum, just what induces post-arrest, post-Miranda silence remains . . . a mystery . . . Silence in the face of accusation is an enigma . . .

Wainwright, — U.S at — n. 11, 106 S.Ct. at 640 n. 11, 88 L.Ed.2d at 631-32 n. 11 (citations omitted), (quoting *State v. Burwick,* 442 So.2d 944, 948 (Fla.1983)).

Based upon the foregoing rationales, the *Wainwright* Ccurt carved out a limited exception to the general admissibility of voluntary, spontaneous statements. This exception applies to "the statement of a desire to remain silent, as well as a statement of a desire to remain silent until an attorney has been consulted." *Wainwright* — U.S at —, 106 S.Ct. at 640-41, 88 L.Ed.2d at 632 n. 4b. Appellee's statements went far beyond the parameters of these limited exceptions. He questioned the quality of public defenders, whether a particular individual was his attorney, and whether consultation with his attorney would be logistically possible. These rather complex inquiries bear little resemblance to the *Wainwright* exceptions. Appellee's question concerning the quality of public defenders cannot possibly be interpreted as a "statement of a desire to remain silent." *Id.*

Nor do the *Wainwright* rationales support extending that case's holding to include situations such as this. Justice Stevens stated that use of a defendant's silence is fundamentally unfair because it violates an implied promise by the government that silence will cause no penalty. *Id.* at —, 106 S.Ct. at 640-41, 88 L.Ed.2d at 632. However, the

government has made no implied promise that the defendant is entitled to do anything but remain silent or indicate that he intends to exercise his right to do so. Any other statements made by an accused are made at his own risk. The *Wainwright* Court's decision was logical because if an accused wishes to see an attorney he must somehow communicate that desire. A suspect's right to remain silent until counsel arrives would be totally meaningless if he could not communicate his wishes without fear of self-incrimination. A right which cannot be exercised without penalty protects no one. However, an accused can effectively exercise his right to counsel without questioning the police about the entire nature of the attorney-client relationship. The accused has no constitutional right to demand that the police engage in a comparative analysis of attorney qualifications. Nor does he have a constitutional right to a logistical explanation of how and when he will meet with his attorney. Nor does he have a constitutional right to inquire into the background of each person who passes by while he's waiting in the stationhouse.

An accused's statements do not receive constitutional protection because they include a reference to lawyers. As the Pennsylvania Supreme Court has stated:

> To hold that every utterance of the word "lawyer" automatically erects [a] 'cone of silence' around the accused . . . would be far too rigid and would not serve the interests or needs of justice.

Commonwealth v. Hubble, 509 Pa. 497, 511, 504 A.2d 168, 175 (1986).

The majority correctly notes that *Hubble* is not controlling of the instant case but it certainly is instructive. The *Hubble* Court recognized that there is no constitutional principle affording protection to all statements containing the word lawyer. Reduced to its bare essentials, that is the very argument made by the appellee. He has demonstrated

no other reason why his statements should receive constitutional protection. They were not an invocation of his right to counsel nor were they necessary for the effective exercise of that right. Appellee's statements were nothing more than inquiries into the attorney-client relationship. This Court has today recognized a constitutional right to investigate your attorney's background and qualifications. I doubt that Justice Stevens intended such an expansive interpretation when he wrote that "silence does not mean only muteness." In the future, Pennsylvania law enforcement officials and trial judges will have little idea as to when an accused's statements shed the cloak of silence and lose constitutional protection. If "silence" includes questioning of whether a public defender is as qualified as a private attorney, does it also include inquiries into the attorney's law school background, class rank, professional honors, publications and income? Denying an accused constitutional protection for these types of statements hardly rises to the level of fundamental unfairness cited by the *Wainwright* Court.

Nor were appellee's statements "insolubly ambiguous". There is no ambiguity in a straightforward inquiry into the qualifications of the public defender. Appellee's statement exhibits concern over whether he will receive effective representation. Though this is certainly not conclusive proof of sanity, it demonstrates coherent, rational thought and is highly relevant where the plea is based on insanity.

The *Miranda* Court intended to safeguard the right of innocent persons. Towards that end, the Court afforded accused persons a two-pronged protection. The Court required that police inform suspects of their constitutional rights and the court protected arrestees from coercive police techniques. It is often forgotten that in *Miranda*, the indigent Mexican defendant was seriously disturbed and was never informed of his rights. Yet, the prosecution miraculously produced a typed and signed confession stating that he understood his rights and had voluntarily

waived them. This voluntary waiver occurred after a long period of isolation in a special police interrogation room. The Court's decision was in reaction to this obvious abuse of police power.

The *Miranda* Court also catalogued some of the techniques used by police to coerce confessions from suspects. *Miranda* 384 U.S. at 446-455, 86 S.Ct. at 1613-18. The Court noted that police had sometimes used "physical brutality — beating, hanging, whipping . . . in order to extort confessions." *Id.* at 446, 86 S.Ct. at 1613. The Court also discussed the use of isolation, legal misstatements and trick line-ups. The Court described these psychological pressures as "[psychological] intimidation . . . destructive of human dignity." *Id.* at 457, 86 S.Ct. at 1619. However, appellee admits that his statements were not coerced and the record does not contain even a hint of psychological intimidation by the police. Also, appellee's own statements show that he understood his rights. He questioned whether the public defender was as qualified as a private attorney and where he could meet with his attorney. These are not the statements of a person who does not realize that he has the right to an attorney. Appellee's questions show that he not only understood his rights but was busy scheming as to the best way to utilize them.

The *Miranda* Court was careful to note that "[a]ny statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." *Id.* at 478, 86 S.Ct. at 1630. The Court did not intend to turn law enforcement into a contest of technicalities. The Court wished only to protect innocent persons against the evils enumerated above. In the ensuing years, courts have lost sight of the policies underlying *Miranda*. Some decisions have forced law enforcement officials to battle the very legal system they are supposed to serve in order to convict guilty offenders. I am saddened to say that today's decision by this panel continues this unfortunate distortion of

Miranda. Appellee admits that he is guilty as charged and that the statements in question were voluntarily made, yet, this panel requires those statements be held inadmissible.

The *Miranda* Court stated that it did not wish to "constitute an undue interference with a proper system of law enforcement." *Id.* at 481, 86 S.Ct. at 1631. Unfortunately, today's decision cannot help doing just that. It is a completely unwarranted deviation from the long-standing principle that voluntary statements are admissible.

Accordingly, I must dissent.

In the Court of Common Pleas of Bucks County, Pennsylvania Criminal Division

COMMONWEALTH	:	NO. 4683/85
	:	
vs.	:	
	:	
ANDREW HUNSBERGER	:	Pre-trial Motions

BEFORE: HON. EDWARD G. BIESTER, JR., J.

Doylestown, Pennsylvania

April 7, 1986 order of the Honorable Edward G. Biester
of the Bucks County, Pennsylvania
Court of Common Pleas

Notes of Testimony of April 7, 1986, page 23,
line 10 to page 27, line 17

APPEARANCES:

Dale A. Reichley, Esquire
David Zellis, Esquire
For the Commonwealth

Stuart Wilder, Esquire
Donna McKillop, Esquire
For the Defendant

THE COURT: The Court accepts the previously stipulated facts and factual background for this question as presented by both counsel in essentially stipulated form.

The Court has reviewed very carefully the case of *Wainwright versus Greenfield.* That is a case before the United States Supreme Court, argued November 13th, 1985 and decided January 14th, 1986. Majority opinion was written by Mr. Justice Stevens.

In that case, the issue was two-fold: One, the use of the defendant's silence after *Miranda* warnings as allegedly evidence of sanity; and secondly, his request for the assistance of counsel as evidence of sanity.

A careful review of the opinion demonstrates that with respect to the issue of counsel, I find Mr. Justice Stevens writing for the majority made the following statement on — in the Supreme Court Reporter Volume 106, Page 640. "However, as the dissenting judge in the Florida Court of Appeals recognized in this very case, the State's legitimate interest in proving that the defendant's behavior appeared to be rational at the time of his arrest could have been served by carefully framed questions that avoided any mention of the defendant's exercise of his constitutional rights to remain silent and to consult counsel." That is the language of the majority.

In fact, as one reads the essentially concurring opinion, it concurs in the result only, I find that Mr. Justice Rehnquist's concurring opinion joined in by the Chief Justice distinguishes in fairly strong language the matter of silence, and concedes a certain ambiguity can occur as a result of silence which does not bear upon the sanity question from the requests to have counsel. And Mr. Justice Rehnquist urges that seeking counsel while not to any degree probative of a sense of

guilt of any kind, only does not come in in non-insanity cases because it is a non-issue.

Justice Rehnquist finds that particularly relevant to an insanity defense case. And it is that distinction between Mr. Justice Rehnquist and the Chief Justice on the one hand and the majority on the other which seems to form the basis for filing a concurring opinion.

Since the concurring opinion points out the distinction, and since the language of the majority is clear with respect to not only silence but the request for counsel, the motion of the defense with respect to those words which would be testified to relating to speaking with an attorney, referring to Ms. Mabon as an Assistant District Attorney, and his desire to speak with an attorney of his own, and his question whether public defenders are as good as money lawyers, and his request to how he would obtain help from a public defender's office on the 6th floor of the courthouse when he was in custody, the motions to exclude that testimony is granted.

I would point out that the very paragraph I have read from, from the majority opinion, offers to the Commonwealth the possibility of framing carefully framed and neutral questions which avoid specific mention of the exercise of constitutional rights. And it may very well be quite possible for the Commonwealth to frame appropriately neutral questions which refer to those periods of time and refer to the conversational behavior of the defendant.

I will rule on those questions as they may be submitted, and I invite that they be submitted at sidebar before exposed to the jury.

MR. REICHLEY: Your Honor, in a manner of clarification, if I may, with all due respect, so I understand your ruling, is your ruling — talking about carefully

framed questions, are you saying that no matter how carefully I frame a question, still the words the defendant said, "Are public defenders as good as money lawyers" cannot be said and told to this jury.

THE COURT: I would say that's correct. But again I invite counsel to attempt to prepare carefully framed questions. And under the circumstances I think it would be a mistake for those questions to be offered to the jury without first being offered to the Court.

Is that satisfactory?

MR. WILDER: So far it is, Your Honor.

THE COURT: All right.

MR. REICHLEY: Your Honor, with your Court's ruling, again with all due respect to the Court, I must ask at this time for, approximately, a ten-minute recess so I can confer with perhaps my boss, members of the Hunsberger family concerning the possibility of the substantial effect this might have on the Commonwealth's case, because of the fact it's an insanity issue, —

THR COURT: That's fair enough.

MR. REICHLEY: — to determine whether or not at this time Commonwealth wishes to appeal your ruling in an interlocutory appeal.

THE COURT: That's fair enough. You may make it 15 minutes.

MR. REICHLEY: I apologize for that. I just ask for ten minutes.

THE COURT: No problem.

MR. REICHLEY: I think it's critical to our case, or I wouldn't be asking.

THE COURT: Certainly. We'll take a 15-minute recess for that purpose then.

MR. REICHLEY: Thank you.

(Recess taken at this time.)

THE COURT: All right. The record should reflect while I was in chambers a few moments ago I was advised by counsel for the Commonwealth that the Commonwealth desires to take an interlocutory appeal from the order which I most recently entered. And that is certainly their right.